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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 795

ROBERT R. KAUFMAN,

Petitioner,

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the orders of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on February 3, 1966, intermediate orders for rehearing and re-argument, and the order entered on May 4, 1967 in the above entitled case.

OPINION BELOW

The opinion of the court below with respect to the order of February 3, 1966, is reported at 25 A.D.2d 48, 266 N.Y.S. 2d 958. No opinions were written in connection with the other orders.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). An order of disbarment was entered by the Appellate Division on February 3, 1966. On March 31, 1966, the Court of Appeals of the State of New York entered an order denying petitioner leave to appeal. On June 16, 1966, the Appellate Division entered an order denying petitioner's motion for rehearing and other relief. On September 22, 1966, the Court of Appeals denied a motion to dismiss an appeal from the order of June 16, 1966, and dismissed as untimely a motion for leave to appeal. On October 25, 1966, the Court of Appeals granted a stay of the disbarment order pending the appeal from the orders of February 3, 1966 and June 16, 1966. On November 22, 1966, the Appellate Division denied a motion for reargument of its orders of February 3, 1966 and June 16, 1966. On December 30, 1966, the Court of Appeals dismissed appeals from the Appellate Division's orders of February 3, 1966 and June 16, 1966. On January 12, 1967, the Court of Appeals dismissed an appeal from the Appellate Division's order of November 22, 1966. On May 4, 1967, the Appellate Division entered an order denying petitioner's motion for recall of the disbarment order and other relief. On July 7, 1967, the Court of Appeals entered orders denying petitioner's motion for leave to appeal and dismissing the appeal taken as of right from the Appellate Division's order of May 4, 1967. By an order of this Court dated September 26, 1967, the time for filing a petition for a writ of certiorari was extended to and including November 6, 1967.

QUESTION PRESENTED

Whether disbarment is a criminal sanction within the scope of the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action, so that incriminating testimony obtained by coercion is precluded from use in a disciplinary proceeding.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

No person * * * shall be compelled in any criminal case to be witness against himself * * *.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on February 2, 1938. Disciplinary proceedings were instituted on June 12, 1962 by the filing of a petition containing charges of professional misconduct. A supplemental petition containing additional charges was filed on November 17, 1964. A hearing on the charges was held before a referee who rendered his report dated September 24, 1965, sustaining six of the nine charges filed against petitioner. On February 3, 1966, the Appellate Division confirmed the report of the Referee and ordered petitioner disbarred from practice as an attorney and counselor at law in the State of New York effec-

tive February 3, 1966. The charges sustained related to obtaining funds purportedly to influence marital litigation in behalf of his client, failure to make proper disclosure with respect to fees received in a matrimonial proceeding, conversion of client funds, and issuance of checks for personal matters without sufficient funds on deposit to pay them.

On March 31, 1966, the Court of Appeals denied petitioner's motion for leave to appeal. 17 N.Y.2d 422, 216 N.E. 32. Petitioner thereafter moved for rehearing and other relief which the Appellate Division denied by order of June 16, 1966. During the pendency of appeal from the disbarment order of February 3, 1966 and the order of June 16, 1966 denying rehearing, the Court of Appeals on October 25, 1966, granted a stay of the disbarment order. 18 N.Y.2d 811, 221 N.E.2d 919. This appeal was dismissed on December 30, 1966. On January 12, 1967, the Court of Appeals dismissed petitioner's appeal from the Appellate Division's order of November 22, 1966 which denied his motion for reargument with respect to its prior orders on the ground that the order appealed from did not finally determine the proceeding within the meaning of the State Constitution. 19 N.Y.2d 597, 244 N.E.2d 743.

On March 10, 1967, petitioner moved for the recall of the disbarment order of February 3, 1966, reopening of the disciplinary proceeding, the suppression of all incriminating evidence obtained as a result of coercion and other relief. A supporting affidavit, sworn to by petitioner on March 8, 1967, stated that attorneys for the bar association demanded, under threat of disbarment for noncompliance, that petitioner divulge certain information, produce papers from his files in the office of the bar association committee on grievances, and furnish written and oral statements with respect to matters under investigation. Exemplifying the threats described by petitioner, he annexed to his affidavit a letter from the attorney for the Committee on Grievances which read as follows:

> We have received no reply to our letter of July 1, 1964. Unless the requested statement is received on or before September 1, 1964, we will have no alternative but to present formal charges, including a charge of failing to cooperate with the Committee, to the Committee on Grievances.

At the time of this letter "a charge of failing to cooperate" in a disciplinary investigation had been held an adequate ground for disbarment. *Cohen v. Hurley*, 366 U.S. 117. Petitioner's affidavit continued that as a result of these threats by attorneys for respondent he supplied various documents and information which were used as evidence and to obtain evidence against him in the disciplinary hearing. Petitioner's motion and supporting affidavit claimed that the threat of disbarment to obtain inculpatory evidence constituted a violation of the self-incrimination privilege of the Fifth and Fourteenth Amendments and requested the suppression of all evidence obtained as a result of this coercion.

Respondent's answering affidavit did not controvert petitioner's assertion that incriminating information had been obtained from him under the threat of disbarment, but argued that petitioner's constitutional rights were not violated because he had "never asserted the privilege against self-incrimination." The affidavit argued further that *Spevack v. Klein*, 385 U.S. 511, "in no way alters the attorney's duty to cooperate with an investigation of complaints against him, absent a claim of privilege." The affidavit also contended that there was sufficient evidence without petitioner's testimony and without the information provided by him during the preliminary disciplinary investigation to support the disbarment order. Accordingly, the affidavit asserted, "In these circumstances, even if respondent's reliance upon *Spevack* is deemed proper, no new reference is necessary. The Court can simply strike all evidence obtained from respondent, together with his own testimony, and can make a final determination predicated upon the revised record."

Petitioner's reply affidavit, dated March 15, 1967, stated that evidence with respect to all the disciplinary charges was obtained from him under the coercive threat of disbarment. Respondent's affidavit of March 17, 1967 in answer to petitioner's March 15th affidavit denied that any "improper demand or threat, etc., was ever made" and explained this denial as follows:

> Respondent was advised, when he failed to submit statements which he had been asked to furnish, that unless he did so an additional charge of failing to cooperate with the Committee on Grievances would be made. Such advice was perfectly proper inasmuch as respondent never asserted the privilege against self-incrimination as a basis for failing to cooperate with petitioner's investigation. As we pointed out in our affidavit in opposition, the attorney's duty to cooperate, absent a claim of privilege, has not been altered by any Supreme Court decision.

Petitioner's further affidavit of March 18, 1967 stated that respondent "demanded and so obtained exhibits and papers from deponent on each and every charge."

The Appellate Division did not adopt respondent's suggestion of striking all evidence obtained from petitioner, together with his own testimony, and making "a final determination predicated upon the revised record" but, on May 4, 1967 entered an order denying petitioner's motion in all respects. Nine days earlier, on April 25, 1967, in *In re Ungar*, 282 N.Y.S.2d 158, the court below had held that the privilege against self-incrimination "does not inhibit the use in a disciplinary proceeding of testimony" compelled under a grant of "immunity from prosecution" because "it has not been held that a disciplinary proceeding is in the nature of a criminal cause."

REASONS FOR GRANTING THE WRIT

1. Respondent's coercive demands, in the course of its investigation of petitioner's fitness to continue as a member of the bar, that petitioner furnish documents and information pertinent to possible disciplinary charges confronted petitioner with the alternative of providing his accuser with inculpatory evidence with respect to possible disbarment or being disbarred for his refusal to do so. Our adversary system of justice safeguarded by the Constitution prohibits placing a person in such a dilemma in a criminal case. Punishment cannot be imposed for refusal to furnish incriminating information in reliance upon the privilege. *Spevack v. Klein*, 385 U.S. 511; *Griffin v. California*, 380 U.S. 609. And, if incriminating information is furnished under threat of punishment for refusal to supply it, the information so coerced is not available for use as evidence in a criminal case. *Garrity v. New Jersey*, 385 U.S. 493; *Ullmann v. United States*, 350 U.S. 422. If a disciplinary proceeding is a "criminal case" within the scope of the privilege against self-incrimination, the refusal of the court below to suppress the compelled, incriminating evidence violated petitioner's rights under the Fifth and Fourteenth Amendments. Although the precise question has not been decided, the rejection by the court below of petitioner's invocation of the privilege appears inconsistent with decisions of this Court (1) holding civil forfeitures to be within the protection of the self-incrimination privilege and (2) holding disbarment and other disqualifications from employment to be the equivalent of criminal punishment in the context of other constitutional protections.

Although many decisions intimate an affirmative answer to the question whether a disbarment proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony, none is dispositive on the point. In *Spevack v. Klein*, 385 U.S. 511, expressly overruling *Cohen v. Hurley*, 366 U.S. 117, the Court held that the privilege against self-incrimina-

tion is available to attorneys and that disbarment is a punishment which cannot be imposed for invoking the privilege and refusing to testify in an investigation of the conduct of attorneys. Since the privilege may have been invoked to avoid incrimination with respect to a statutory crime, the decision cannot be considered a holding that the privilege is available with respect to the sanction of disbarment. In *Kaye v. Coordinating Committee*, 386 U.S. 17, which involved a claim that use of compelled testimony in the disciplinary proceeding violated the privilege against self-incrimination, the Court, *per curiam*, vacated the disbarment order and remanded the case for reconsideration in light of *Spevack v. Klein*. Similarly, in *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, the Court, *per curiam*, vacated an order disbarring one attorney and suspending another which was based on the testimony and records of the attorney. But *Kaye* also involved, in addition to the use of compelled testimony in the disciplinary proceeding, the penalty of an adverse presumption because of his failure to testify. Similarly, *Zuckerman* involved the imposition of punishment [disbarment instead of suspension] for invoking the privilege as well as the use of enforced evidence. Since the Court wrote no opinions in these cases, the precise rationale of the decisions is left to speculation.

The question whether disqualification from federal employment is a criminal sanction within the protection of the privilege was raised but left unanswered in *Ullmann v. United States*, 350 U.S. 422, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled under a grant of immunity might result in disqualification from federal employment and other disabilities. Upholding the statute, the Court found it unnecessary to decide whether such disqualification was equivalent to criminal punishment for purposes of the self-incrimination privilege, on the rationale that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at

431. Mr. Justice Douglas' dissenting opinion asserted, however, that "disabilities imposed by federal law [such as "ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment"] are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself." 350 U.S. at 440-441.

The rejection by the court below of petitioner's claim of privilege with respect to the penalty of disbarment appears to be at odds with the decisions of this Court holding civil forfeitures within the protection of the privilege. *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476; *cf. Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701. Certainly, forfeiture of the right to practice a profession is no less a penalty than forfeiture of property. The applicability of the privilege to property forfeitures was reaffirmed in *Spevack v. Klein* when the opinion of Mr. Justice Douglas referred to "the Board protection given the privilege" in *Boyd v. United States* which it described as a case "where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). Mr. Justice Douglas also noted that the "views expounded in the dissents in *Cohen v. Hurley* [now overruled] need not be elaborated again." Among the "views" so "expounded" were those of Mr. Justice Black that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the law of the land' " (366 U.S. at 147) and those of Mr. Justice Douglas that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

Numerous decisions of the Court hold disbarment or denial of the right to engage in other occupations equivalent to a criminal penalty for the purpose of other constitutional provisions. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder

and ex post facto prohibitions. *Ex parte Garland*, 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (disqualification from holding union office held punishment). Since disqualification from the pursuit of one's vocation appears to be no less a criminal punishment for purposes of the privilege against self-incrimination, rejection of the claim of the privilege by the court below with respect to disbarment warrants review by this Court.

2. Petitioner relied upon the privilege against self-incrimination in his motion of March 10, 1967, for recall of the disbarment order, reopening of the disciplinary proceeding, and suppression of evidence, filed approximately two months after the Court of Appeals on January 12, 1967, had dismissed petitioner's appeal "upon the ground that the order appealed from [order of November 22, 1966 which denied a motion for reargument with respect to the disbarment order and other orders in the proceeding] does not finally determine the proceeding within the meaning of the Constitution." 19 N.Y.2d 597, 224 N.E.2d 743. *Cohen v. Hurley*, 366 U.S. 117, which had upheld the right of a state to disbar an attorney for invoking the privilege was not overruled until January 16, 1967. *Spevack v. Klein*, 385 U.S. 511. The New York Court of Appeals had applied the doctrine of *Cohen v. Hurley* as late as December 1, 1965 in *Spevack v. Klein*, 16 N.Y.2d 1048, 213 N.E.2d 457; 17 N.Y.2d 490, 214 N.E.2d 373. *Kaye v. Coordinating Committee*, 386 U.S. 17, and *Zuckerman v. Greason*, 386 U.S. 15, had not been decided until February 13, 1967. Petitioner's motion invoking the privilege was made less than 30 days thereafter.

The overruling of *Cohen v. Hurley* in *Spevack v. Klein* may properly be regarded as a supervening event which en-

titled petitioner to raise the constitutional question by his motion of March 10. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v. Hill* 281 U.S. 673. In view of the holdings of controlling decisions at the time (*Cohen v. Hurley* and *Spevack v. Klein*) petitioner cannot be charged with having waived his constitutional rights by not having raised them at an earlier stage of the proceeding. "There is a presumption against a waiver of constitutional rights * * *, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege' ". *Brookhart v. Janis*, 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights is indulged (*Johnson v. Zerbst*, 304 U.S. 458, 464; *Glasser v. United States*, 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 384 U.S. 436, 475) have obviously not been met.

3. The court below held in *In re Ungar*, 282 N.Y.S.2d 158, certiorari pending, No. 685, October Term, 1967, that the privilege "does not inhibit the use in a disciplinary proceeding," of compelled testimony because "it has not been held that a disciplinary proceeding is in the nature of a criminal cause." This view of the scope of the privilege provides a basis for the unexplained rejection of petitioner's constitutional claim in the present case. This construction of the privilege would also be operative in the reconsideration of *Kaye v. Coordinating Committee*, 385 U.S. 17, on the remand to the same court. The Appellate Division, Second Department, apparently adopted the same view in its initial reconsideration of *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, on the remand by this Court. Although evidence supplied by both attorneys involved had been used against them in a disbarment proceeding, Zuckerman had refused to turn over certain income tax information. Zuckerman had been disbarred and Haber suspended. On the remand, the Appellate Division modified its original order only to the extent of reducing Zuckerman's punishment

to suspension for the same period as Haber. The order remained unchanged as to Haber. It is clear that the Court eliminated the punishment it had imposed for Zuckerman's reliance on the privilege to refuse to turn over certain information but assumed that the privilege did not preclude use of self-incriminating evidence in the disbarment proceeding. *Zuckerman v. Greason*, 280 N.Y.S.2d 904. Because this result had been reached without affording the parties a hearing the Court of Appeals reversed (*Zuckerman v. Greason*, 19 N.Y.2d 977, 281 N.Y.S.2d 523, decided June 1, 1967), holding that "The reversal by the United States Supreme Court of the orders in the disciplinary proceedings, with remand to the Appellate Division, leaves room for interpretation. Consequently due process required notice to appellants and opportunity to be heard". The question of the propriety of admitting enforced testimony in the disbarment proceedings affecting these two attorneys is still before the New York courts.

The customary procedure in New York in disciplinary investigations involving attorneys apparently has been to require the attorney involved to supply the investigation agency with records and information relating to the matter under inquiry under threat of disbarment for refusal to do so. (See, e.g., in addition to the present case, *Cohen v. Hurley, supra; Spevack v. Klein, supra; Kaye v. Coordinating Committee, supra; Zuckerman v. Greason, supra.*) Under the ruling of the Appellate Division in the *Ungar* case the only change which would be required by this Court's decision in *Spevack v. Klein, supra,* is an offer of immunity from criminal prosecution if the privilege is invoked. Immunity may replace the privilege (*Ullmann v. United States*, 350 U.S. 422) and if a disbarment proceeding is not a criminal cause, as held by the court below, disbarment may be imposed for refusal to furnish incriminating evidence with respect to disbarment when immunity from criminal prosecution has been granted. See dissenting opinion of Mr. Justice White in *Spevack v. Klein*, 385 U.S. 511, 530. The doubtful validity of such a procedure in light of the closely related decisions of this Court

and the views expressed by some of its present members, as well as the number of pending cases in which the issue is pertinent, argues strongly for the desirability of an early resolution by this Court of the heretofore unresolved question whether a disbarment proceeding is a "criminal case" for purposes of the privilege against self-incrimination.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT, APPELLATE DIVISION

First Department, December 1965

Bernard Botein, P. J.,
Charles D. Breitel,
Harold A. Stevens,
Samuel W. Eager,
Aron Steuer, JJ.

In the Matter
of
Robert R. Kaufman,
an Attorney.

Motion No. 9
December 7, 1965

Disciplinary proceedings instituted by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on February 2, 1938, at a Term of the Appellate Division of the Supreme Court in the Second Judicial Department.

Michael Franck for petitioner (John G. Bonomi, attorney), The Association of the Bar of the City of New York

H. Elliot Wales for respondent.

PER CURIAM:

This is a motion to confirm the report of the referee which sustained charges of professional misconduct against the respondent.

Respondent, age 51 years, was admitted to practice February 1938 in the Appellate Division, Second Department. Proceedings were instituted against him June 12, 1962. Subsequently a supplemental petition was filed. In all a total of 9 charges were preferred of which one, charge No. 4, was discontinued, and charges 7 and 9 were not sustained by the referee. The charges which were sustained and upon which

petitioner moved to confirm the referee's report may be summarized briefly.

It was charged that respondent demanded and obtained from one William Barash, his client, $3,000 in cash over the fee charged on the representation that he could improperly influence marital litigation in behalf of his client and that he converted the proceeds of a check in the amount of $670 payable to Marilyn and William Barash, husband and wife; that he had made and caused his client, a Mrs. Serayder, to make a false statement in affidavits submitted by them in a matrimonial proceeding in which he represented Mrs. Serayder. That charge was sustained only to the extent that the referee found he failed to make proper disclosure.

There were two additional charges that he engaged in a course of conduct of issuing worthless checks. Respondent's contention that the checks were for personal matters and that all were eventually made good does not change the nature of the offense or invalidate the determination.

The final charge, sustained by the referee, as were the others referred to, was that the respondent converted to his own use without authority the sum of $5275 representing his client's share of a settlement in a personal injury action. The evidence amply supported the referee's findings and the report is confirmed.

The respondent has been guilty of professional misconduct which demonstrates his unfitness to continue in the practice of the law. The respondent should be disbarred.

ALL CONCUR.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of February, 1966.

Present— Hon. Bernard Botein, Presiding Justice,
" Charles D. Breitel,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer, Justices.

In the Matter
of
Robert R. Kaufman,
an Attorney.

5

The Association of the Bar of the City of New York, by Eric Nightingale, Esq., its attorney, having presented to this Court on the 12th day of June, 1962, a petition containing charges of professional misconduct against the above-named respondent, Robert R. Kaufman, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 2nd day of February, 1938, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, Rudolph Stand, Esq., and having interposed an answer to said petition, duly verified the 25th day of June, 1962, and the Court having duly made and entered an order on the 12th day of July, 1962, appointing Theodore R. Kupferman, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and thereafter and on the 17th day of November, 1964, The Association of the Bar of the City of New York, having presented to this Court a supplemental petition containing additional charges of professional misconduct against the above-named respondent and having

petitioned the Court to take such action upon such additional charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, H. Elliot Wales, Esq., and having interposed an answer to said supplemental petition, duly verified the 18th day of November, 1964, and the Court having duly made and entered an order on the 1st day of December, 1964, appointing Theodore R. Kupferman, Esq., as Referee herein to take testimony in regard to said additional charges and to report to this Court his opinion thereon; and thereafter and on the 18th day of February, 1965, an order of this Court having been made and entered relieving Theodore R. Kupferman, Esq., as Referee herein, which appointment was contained in the orders of this Court entered on July 12, 1962 and December 1, 1964, and appointing Samuel C. Coleman, Esq., as Referee in the place and stead of Theodore R. Kupferman, Esq., and a stipulation having been entered into between the attorneys for the respective parties, dated January 25, 1965, that the record of the proceedings held to date before Theodore R. Kupferman, Esq., Referee, including the testimony of all witnesses, shall be binding in the same manner as if same had taken place before the new Referee; and the hearing, pursuant to said order of reference having been duly continued before Referee Samuel C. Colemen and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 24th day of September, 1965, and was filed in the office of the Clerk of this Court on the 1st day of October, 1965;

And the petitioner thereafter and on the 7th day of December, 1965, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 31st day of May, 1962, the affidavit of Eric Nightingale, Esq., annexed thereto,

sworn to the 29th day of May, 1962, the notice of presentation of said petition, dated the 31st day of May, 1962, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 25th day of June, 1962, the order of this Court, dated the 12th day of July, 1962, appointing Theodore R. Kupferman, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 12th day of July, 1962, the supplemental petition of The Association of the Bar of the City of New York, verified the 4th day of September, 1964, the affidavit of John G. Bonomi, Esq., annexed thereto, sworn to the 3rd day of September, 1964, the notice of presentation of said supplemental petition, dated the 4th day of September, 1964, with proof of due service thereof upon the respondent, the answer of the respondent to said supplemental petition, verified the 18th day of November, 1964, the order of this Court, dated the 1st day of December, 1964, appointing Theodore R. Kupferman, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 1st day of December, 1964, the order of this Court entered on February 18, 1965, relieving Theodore R. Kupferman, Esq., as Referee herein, and appointing Samuel C. Coleman, Esq., as Referee in the place and stead of Theodore R. Kupferman, Esq., the stipulation of the attorneys for the respective parties, dated January 25, 1965, the report of Samuel C. Coleman, Esq., the Referee herein, dated the 24th day of September, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 1st day of October, 1965; and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 26th day of October, 1965, with proof of due service thereof, and after hearing Mr. John G. Bonomi for the motion, and Mr. H. Elliot Wales opposed, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of profes-

sional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Samuel C. Coleman, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 1st day of October, 1965, be, and the same hereby is, confirmed; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective March 3, 1966; and it is further unanimously

Ordered that the name of said Robert R. Kaufman be struck from the roll of attorneys and counselors-at-law in the State of New York effective March 3, 1966; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective March 3, 1966; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective March 3, 1966; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto effective March 3, 1966.

ENTER:

HYMAN W. GAMSO
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 4th day of May, 1967.

Present– Hon. Bernard Botein, Presiding Justice
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer,
" Louis J. Capozzoli, Justices

In the Matter
of
Robert R. Kaufman,
An Attorney.

M-1558

The above-named respondent having moved this Court for an order vacating the order of disbarment of this Court, entered on February 3, 1966; reopening the hearings de novo before a different Referee; staying the operation and effect of the aforesaid order of disbarment; and for other relief,

Now, upon reading and filing the order to show cause, dated March 10, 1967, with proof of due service thereof, and the affidavits of Robert R. Kaufman, duly sworn to the 8th day of March, 1967, the 15th day of March, 1967, and the 18th day of March, 1967, in support of said motion, and the affidavits of Michael Franck, duly sworn to the 13th day of March, 1967, and the 17th day of March, 1967, in opposition thereto, and after hearing Mr. Robert R. Kaufman, appearing pro se, for the motion, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed,

It is ordered that the said motion be and the same hereby is denied in all respects.

ENTER:

HYMAN W. GAMSO
Clerk.

STATE OF NEW YORK

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1967.

Present, Hon. Stanley H. Fuld, Chief Judge, presiding

1 Mo. No. 600
In the matter of
Robert R. Kaufman, an Attorney,
Appellant,
The Association of the Bar of
the City of New York,
Respondent.

A cross-motion for leave to appeal to the Court of Appeals &c. in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion be and the same hereby is denied.

A copy

Gleason Kimball
Deputy Clerk

STATE OF NEW YORK,

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1967.

Present, Hon. Stanley H. Fuld, Chief Judge, presiding.

1 Mo. No. 600
In the Matter of
Robert R. Kaufman, an Attorney,
Appellant,
The Association of the Bar of
the City of New York,
Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken as of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the constitution.

A copy

Gleason Kimball
Deputy Clerk

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 795

ROBERT R. KAUFMAN,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on May 4, 1967, denying petitioner's motion to vacate the Appellate Division's order of February 3, 1966, disbarring petitioner. On July 7, 1967, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal and dismissed his appeal as of right.

ARGUMENT

POINT I

Petitioner did not timely raise the claim underlying the petition for certiorari.

Petitioner was disbarred by order of the Appellate Division entered February 3, 1966. He first raised the contention upon which the petition for certiorari is predicated more than one year later, on March 10, 1967, when he submitted the motion to vacate the order of disbarment, review of the denial of which is here sought. Petitioner had previously neither objected to respondent's requests for information during the pendency of its investigation of the matters which subsequently resulted in formal charges against petitioner nor to the introduction in evidence during the course of the proceeding itself of the statements and documents which he had furnished.

Petitioner argues that his failure to raise the contention he now advances while the disciplinary proceeding was pending should be excused because of the reversal, following his disbarment, of *Cohen* v. *Hurley*, 366 U. S. 117, in *Spevack* v. *Klein*, 385 U. S. 511. He contends that this was a "supervening event" which entitled him to thereafter raise the constitutional question now urged which, prior to the *Spevack* decision, was untenable (Pet. pp. 10-11). We respectfully submit that the lack of merit upon which this contention is predicated is demonstrated by the petition for certiorari itself.

If, in fact, *Spevack* so substantially changed the law, it follows that petitioner could not rely upon any decisions prior to it since they, following petitioner's argument for excusing his failure to raise the constitutional question here presented while the disciplinary proceeding was pending, did not support him. Yet the petition relies upon a number of cases decided long before *Spevack*, principally *Boyd* v. *United States*, 116 U. S. 616, and the bill of attainder and ex post facto cases, *Ex parte Garland*, 4 Wall. 333 and *Cummings* v. *Missouri*, 4 Wall. 277. Petitioner also relies upon *United States* v. *Lovett*, 328 U. S. 303 and *United States* v. *Brown*, 381 U. S. 437. If, as petitioner urges, these cases support his present argument, he should have relied upon them in the course of the disciplinary proceeding and his failure to do so constitutes a waiver.

Moreover, *Spevack* could not have altered the prevailing law with respect to the contention advanced by petitioner since it was in no way there involved. In *Spevack*, this Court held that the institution of a disciplinary proceeding predicated upon an attorney's refusal to answer questions on the ground that he might thereby tend to incriminate himself in the conventional sense was a constitutionally prohibited form of compulsion. Petitioner here does not contend that he was deprived of his right not to incriminate himself in the conventional sense. He contends that a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment and that he should have had the right to refuse to furnish answers which might tend to subject him to discipline. Thus, petitioner himself distinguishes the *Spevack* case from the contention he is advancing here (Pet. pp. 7-8). It follows, therefore, that *Spevack* cannot justify the untimely submission of the argument now advanced by petitioner.

POINT II

The decisions of this Court in *Spevack* v. *Klein* and related cases do not warrant retroactive application.

Even if *Spevack* and the cases which followed it upon which petitioner relies supported his present contention, they would appear to be unavailable to him. Petitioner was disbarred by order entered February 3, 1966. The decision in *Spevack* was announced on January 16, 1967. In order, therefore, for petitioner to avail himself of that decision and those that followed it, *Spevack* must be given retroactive application.

This Court gave no indication in deciding *Spevack* whether it would be applied retroactively. However, recent opinions with respect to the issue of retroactivity strongly suggest that decisions involving interpretations of the constitutional privilege against self-incrimination, such as *Spevack*, will be given prospective effect only. Thus, retroactivity was denied to the doctrine of *Griffin* v. *California*, 380 U. S. 609, forbidding adverse comment upon a defendant's failure to testify in a state criminal trial, in *Tehan* v. *Shott*, 383 U. S. 406. Similarly, retroactivity was denied to the doctrines promulgated in *Escobedo* v. *Illinois*, 378 U. S. 478 and *Miranda* v. *Arizona*, 384 U. S. 436, in *Johnson* v. *New Jersey*, 384 U. S. 719.

In the latter case, this Court noted, 384 U. S. at 727-8, that constitutional rules announced by it would be applied retroactively if they concerned evidence of doubtful reliability and relevancy, affecting the very integrity of the fact-finding process, with the result that retroactivity averted the danger of convicting the innocent. Since there

is no basis for concluding that testimony improperly compelled by the threat of disbarment is either inaccurate or unreliable, it would appear that the *Spevack* decision is to be given prospective effect only and is not applicable to cases, such as that of petitioner here, concluded prior to the announcement of that decision.

The implications of affording petitioner a retroactive application of the *Spevack* decision are far-reaching.

Petitioner neither objected nor invoked his privilege against self-incrimination either when asked for a statement of his position concerning the complaints made against him or when such statements were introduced in evidence. Each of the statements furnished by petitioner concerning the complaints against him, with the exception of that involving his issuance of worthless checks, were exculpatory, denying that he had been guilty of the wrongdoing alleged. The charges predicated upon petitioner's issuance of worthless checks were supported by subpoenaed transcripts of the bank accounts in question, the identity of at least most of which were disclosed to respondent, not by petitioner, but by individuals who had been the recipients of such checks. Each of the remaining charges sustained by the court below was supported by witnesses produced by respondent. If, in these circumstances, *Spevack* is made retroactively available to petitioner, it must follow that it is equally available to reverse every proceeding in which discipline was imposed where the attorney was interviewed in the course of the preliminary investigation and/or testified in the course of the proceeding, prior to January 16, 1967, when the decision in *Spevack* was announced. Disbarred attorneys, who would be entitled to reinstatement merely by contending that they would have

invoked their privilege against self-incrimination had the prevailing law made it available to them, would in many instances be immunized from further proceedings because the passage of time has made unavailable evidence which could have been readily marshalled at the time of the proceeding against them. We respectfully submit that the interests of justice would not be well served by such a result.

POINT III

A disciplinary proceeding is not a criminal case within the meaning of the Fifth Amendment.

In an effort to overcome the clear wording of the constitutional provision, petitioner argues that recent decisions of this Court "intimate" that the term "in any criminal case" as used in the Fifth Amendment has been expanded to include disciplinary proceedings. We respectfully submit that nothing contained in any decision of this Court warrants such a conclusion.

The principal cases relied upon by petitioner are *Spevack* v. *Klein*, 385 U. S. 511; *Kaye* v. *Co-ordinating Committee*, 386 U. S. 17; and *Zuckerman* v. *Greason*, 386 U. S. 15. In each of those cases, the attorney was subject to criminal prosecution in the conventional sense and refused to answer on the ground that to do so might tend to incriminate him. This Court held that the action of the state court in each of those cases predicated upon this invocation of the privilege against self-incrimination constituted an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself "in any criminal case". Thus, *Spevack* struck down the attorney's disbarment for failing to cooperate with the court having

jurisdiction over his license where his refusal to answer was predicated upon the constitutional privilege. *Kaye* reversed the attorney's disbarment which, as indicated in the state court's opinion, was in part predicated upon an adverse presumption based upon the attorney's refusal to testify on the grounds that to do so would tend to incriminate him. *Zuckerman* reversed and remanded the disbarment of one attorney and the suspension of another where the distinction in the discipline imposed was apparently predicated upon the disbarred attorney's failure to answer on the ground that to do so would tend to incriminate him. The distinction between these cases and his own position is conceded by petitioner (Pet. p. 7).

Both *Kaye* and *Zuckerman* were predicated upon the *Spevack* decision. Examination of the majority, concurring and dissenting opinions in that case discloses no "intimation" that the Court was inclined to expand the scope of the privilege against self-incrimination to include disciplinary proceedings.

The majority opinion in *Spevack* indicates that the Court, rather than expand the scope of the privilege which would have immediately resolved the issued there posed, found the act of the State, disbarment, to be an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself in the conventional sense. Thus, Mr. Justice Douglas, writing for the majority, stated:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege."

It follows, therefore, that this Court reversed the disbarment in *Spevack*, not because the attorney there involved had the right to refuse to answer questions which might tend to subject him to discipline (such questions being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he still being subject to criminal prosecution in the conventional sense.

The fact that this Court's decision in *Spevack* turned upon a finding of improper compulsion rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey*, 385 U. S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus, the Court, again speaking through Mr. Justice Douglas, stated:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . ."

It was precisely because this Court did not expand the scope of the privilege but concerned itself with a determination of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimina-

tion in the conventional sense, that Mr. Justice Fortas concurred in the *Spevack* decision while pointing out that, in his judgment, a public employee who refused to answer questions directly related to the performance of his official duties could be discharged even though his refusal was predicated upon the invocation of the privilege against self-incrimination. This expression by Mr. Justice Fortas, whose vote was essential to the majority in *Spevack*, is inconsistent with petitioner's assertion that the scope of the privilege must be interpreted to encompass any governmental act which in any sense "punishes" or affects the individual adversely and, specifically, disqualification from employment (Pet. p. 7).

The dissenting opinion of Mr. Justice White further indicates that the Court itself considered *Spevack* to be a "compulsion" case and not one expanding the scope of the privilege. Thus, he dissented upon the ground that the attorney in *Spevack* could not give any statements which would tend to incriminate him since, if they were furnished under the compulsion of threat of disciplinary action if he refused, *Garrity* prohibited their use against him in any subsequent criminal prosecution. As in the case of the concurring opinion of Mr. Justice Fortas, this dissenting view is inconsistent with the interpretation advanced by petitioner that the majority opinion in *Spevack* "intimates" that the attorney had the right to refuse to answer questions because they might tend to subject him to discipline.

In addition to relying upon decisions of this Court which were announced after his disbarment, petitioner also advances contentions predicated upon prior decisions of this Court, principally *Boyd* v. *United States*, 116 U. S. 616. Such claims, in addition to being untimely, find no support

in the opinions relied upon. Thus, *Boyd* and subsequent decisions of this Court which follow it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, i.e. to incriminate himself.

Petitioner also relies upon prior decisions of this Court involving the constitutional prohibitions against bills of attainder and ex post facto laws. There is no rational basis for concluding that the standards applicable to legislative enactments must necessarily be equated to the term "in any criminal case" limiting the applicability of the privilege against self-incrimination. This is particularly true since such an interpretation would render the term meaningless.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 108 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

There are sound policy considerations which dictate against permitting an attorney to refuse to answer questions which might tend to subject him to discipline as distinguished from criminal prosecution in the conventional sense. To recognize such a right on the part of an attorney is to recognize his right not to account to his client or to the court of which he is an officer. The right to counsel is one of the most precious in our democracy. This Court has taken great pains in recent decisions to afford that right to all, to the accused, the indigent and most recently to juveniles. That right, upon which individual liberty literally depends, is reduced to a hollow mockery if the attorney is no longer answerable to the client whose only resort, if the integrity of his counsel is questioned, is to seek independent evidence of impropriety because the Fifth Amendment has been held to immunize the attorney from any duty to answer inquiries concerning his conduct.

The integrity of the administration of justice is similarly undermined if courts are powerless to inquire into the integrity of members of their bar and are relegated to engage in a quest for independent evidence when the propriety of an attorney's conduct is called into question. The everyday function of our courts is dependent upon the integrity of the attorneys who practice before them. Ex parte applications, the institution of suits, and the issuance of subpoenas, are only a few examples of the powers granted attorneys in reliance upon their integrity which can cause untold damage if abused. To prohibit courts from holding attorneys directly responsible for their conduct and to require independent inquiry would not only interfere with the expeditious disposition of those responsibilities which already overburden our courts but would also destroy the very integrity of the relationship between bar and bench

which makes the administration of justice operable. We respectfully submit that the Fifth Amendment should not be so interpreted as to require, for instance, that a court conduct an independent inquiry before it can remove a trustee appointed by it who refuses to account on the ground that to do so would tend to subject him to discipline.

Further policy considerations mitigate against expanding the scope of the Fifth Amendment to include disciplinary proceedings. Unfortunately, attorneys are sometimes the means through which public officials are corrupted. Such transactions are usually conducted in private so that there are no witnesses present. Consequently, the public official can usually be prosecuted and removed only by granting the attorney immunity from criminal prosecution in the conventional sense and thereby eliciting his testimony concerning the bribe. If the Fifth Amendment is interpreted to give the attorney the right not only not to incriminate himself in the conventional sense but also not to subject himself to discipline, his testimony concerning the bribe can only be elicited by giving him immunity both from criminal prosecution and from discipline. Thus, the attorney's very confession of his guilt would immunize him from removal as a member of the bar. He would thereafter have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted.

We respectfully submit that neither the Fifth Amendment nor any decisions of this Court justify such results.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

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v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent opposes the grant of *certiorari* on the grounds (1) that petitioner waived his constitutional claim, (2) that this Court's decision in *Spevack v. Klein,* 385 U.S. 511, should not be retroactively applied, and (3) that a disciplinary proceeding is not a criminal case within the meaning of the Fifth Amendment.

1. The petition points out (pp. 10-11) that petitioner invoked the privilege against self-incrimination promptly after the decisions of this Court in *Spevack v. Klein, supra, Kaye v. Coordinating Committee,* 386 U. S. 17, and *Zuckerman v. Greason,* 386 U. S. 15, had made clear that the privilege was available to attorneys in state disbarment proceedings. The Court had previously held in *Cohen v. Hurley,* 366 U. S. 117, that a state could disbar an attorney for invoking the privilege. Respondent's claim of waiver is based upon the argument that petitioner relies upon a number of cases decided long before *Spevack* which he could have relied upon in the course of the disciplinary proceeding and that *Spevack* does not justify a refusal to furnish information which might tend to subject an attorney to disciplinary action as distinguished from criminal prosecution.

The simple fact is that, regardless of whether *Spevack v. Klein* or other decisions cited are relevant to the substantive issue presented by the petition, petitioner would have been disbarred if he had invoked the privilege in the disciplinary proceeding before this Court overruled *Cohen v. Hurley* in *Spevack v. Klein.* This was recognized by the New York Court of Appeals in *Zuckerman v. Greason,* decided October 3, 1967 (not yet reported). Upon reconsideration after remand by this Court (386 U. S. 15) the Appellate Division, Second Department, in effect held that the failure of the petitioners to object in the disciplinary hearing to the reception of self-incriminating evidence precluded consideration of the merits of their constitutional claim. *Greason v. Zuckerman,* 28 A. D. 2d 907, 282 N.Y. S. 2d 951. The Court of Appeals, however, passed upon the merits of the constitutional claim, expressly recognizing that the attorneys' reliance on the privilege could have resulted in their disbarment:

> Appellants now contend that sustaining them [the charges] wholly or partly on the basis of data submitted by Zuckerman and Haber is unconstitutional under the holding of the Supreme Court in their case in light of *Spevack* and *Garrity*. *** If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law.

Petitioner's failure to claim the privilege under the threat of disbarment for doing so cannot be construed as a waiver of the constitutional claim.

2. The argument against the retroactive application of *Spevack v. Klein* is wholly irrelevant since petitioner does not claim that *Spevack v. Klein* is controlling here. On the contrary, the petition acknowledges that "the decision cannot be considered a holding that the privilege is available with respect to the sanction of disbarment" (Petition, p. 8), and urges the Court to grant *certiorari* in order to decide "the heretofore unresolved question whether a disbarment proceeding is a 'criminal case' for purposes of the privilege against self-incrimination" (p. 13).

The importance of resolving this question, in view of its frequent recurrence in disciplinary proceedings in the State of New York, is emphasized not only by the decision of the court below in *In re Ungar*, 282 N.Y.S. 2d 158, *certiorari* pending, No. 685, October Term, 1967, but also by the subsequent decision of the New York Court of Appeals in *Zuckerman v. Greason, supra*, which held:

> The Fifth Amendment relates to self-incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature *** The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence that they would be disbarred under *Cohen v. Hurley*, but neither *Garrity* or *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

Respondent's concern that sustaining petitioner's claim would have a serious impact on disciplinary proceedings concluded before the overruling of *Cohen v. Hurley* is premature. More than ten months have passed since this Court's decision in *Spevack v. Klein*. Respondent nevertheless makes no showing that attorneys previously disbarred have sought reinstatement on the ground that they would have invoked the privilege against self-incrimination had the prevailing law made it available to them. This argues strongly against the likelihood of a flood of applications for reinstatement for this reason and suggests that applications for reinstatement filed more than ten months after the overruling of *Cohen v. Hurley* would be subject to denial

as untimely. In any event, the argument is premature because the merits of the constitutional claim have not yet been decided and its determination is important for guidance in the conduct of future disciplinary proceedings. Under the recent New York decisions the penalty of disbarment is not within the protection of the privilege and the inquisitorial procedure heretofore followed in diciplinary proceedings of obtaining inculpatory evidence from the attorneys involved can be continued by the grant of immunity from prosecution for statutory crimes. After the Court has decided whether disbarment is within the scope of the privilege, it will be appropriate to deal with the question of the retroactive application of its decision. See *Tehan v. Shott*, 383 U. S. 406 and *Johnson v. New Jersey*, 384 U. S. 719.

3. In arguing that a disciplinary proceeding should not be treated as a criminal case within the meaning of the Fifth Amendment respondent cites as a horrible example the hypothetical case of an attorney granted immunity to obtain his testimony in the prosecution of a public official for receiving a bribe from the attorney and being permitted to continue as a member of the Bar if the privilege is held to extend to disbarment. Respondent urges that the privilege against self-incrimination should be denied to an attorney so that his testimony may be employed to convict another. It is difficult to conceive of a situation in which the only source of evidence is an attorney involved in corrupting the official. But even if this were so, respondent does not explain why the corrupted official's testimony would not be available in disciplinary proceedings after the trial of the public official has been concluded.

The complaint is frequently heard that persons guilty of heinous crimes will be permitted to go free if constitutional safeguards are held applicable. Undoubtedly, the task of prosecuting officials frequently would be simplified by eliminating the restraining effect of the constitutional guarantees.

But the scope of the great constitutional protections of the Bill of Rights has never been trimmed because prosecutions will thereby be rendered simpler or more efficient.

Respectfully submitted,

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